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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	$	
	$	
Implementation of Sections 3(n) and 332 of the Communications Act	$	GN Docket No. 93-252
	$	
	$	
Regulatory Treatment of Mobile Services	$	
	$	

REPLY COMMENTS OF SOUTHWESTERN BELL CORPORATION

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Dated: November 23, 1993

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To: The Federal Communications Commission

REPLY COMMENTS OF SOUTHWESTERN BELL CORPORATION

Southwestern Bell Corporation ("SBC"), on behalf of Southwestern Bell Mobile Systems, Inc. ("SBMS") and its other operating subsidiaries and affiliates, submits these Reply Comments in response to comments filed by other parties in the above-referenced matter.

I. INTRODUCTION AND SUMMARY

For consumers in the wireless marketplace to fully realize the competitive benefits made possible by the Budget Act, the Commission must exercise its discretion under the Act broadly in a manner calculated to achieve true regulatory parity. That requires an expansive definition of commercial mobile services and forbearance to the maximum extent possible from Title II regulation of those services and from creation of additional structural requirements for providers of those services. Commercial mobile services are defined in the Act and are not limited to cellular service and its functional

equivalents. The purposes of the Act are best served by allowing all commercial mobile service providers the same flexibility to offer similar services such as dispatch services, and by applying consistent regulation to all entities that offer for-profit services, whether they use all or only a portion of their system for that service.

The Commission should focus on the issues presented in the NPRM and not get sidetracked by groups like the National Cellular Resellers Association or the interexchange carriers that are attempting to use this proceeding as a forum to advance separate agendas. Finally, the Commission should recognize that it is premature to adopt any hard and fast rules geared at state re-regulation of commercial mobile services, before market forces have even had a chance to operate in regulated jurisdictions.

II. DISCUSSION

A. Commercial Mobile Services Are Not Limited To Cellular Service And Its Functional Equivalents

The comments filed in this proceeding reveal a significant difference of opinion over the appropriate interpretation to be given the definition of "private mobile services." A broad interpretation of "commercial mobile service," with a correspondingly narrow interpretation of "private mobile service" furthers the goal of regulatory parity and provides the only functional classification system for mobile services. Implementation of the broad

interpretation of private mobile service advanced by some of the commenters, on the other hand, presents serious practical problems. This interpretation allows for the possibility that a service with the statutory attributes of commercial mobile service might not be classified as a commercial mobile service if it lacks the additional attribute of being "functionally equivalent" to some other unspecified commercial mobile service.

Several commenters attempt to overcome this difficulty by making the unsupported assertion that the benchmark commercial mobile service to which all others should be compared is cellular service.[1] The inconsistencies in the existing scheme of regulation requiring cellular carriers to compete with carriers classified as private (and having different regulatory burdens) was a driving force behind the regulatory parity move. However, there has never been any indication of Congressional intent to limit the commercial mobile service designation to cellular carriers and their functional equivalents, nor do the plain words of the Budget Act justify or compel that conclusion.

Services that meet the statutory definition of commercial

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[1] See, e.g., Comments of Utilities Telecommunications Counsel, at p.13; Comments of American Mobile Telecommunications Association, Inc. (AMTA), at pp. 8-11; Comments of Motorola, at p.10; and Comments of PageMart, at p.10. AMTA continually asserts that this is what Congress intends, but provides no support for its assertions. It even goes so far as to make the singular assertion that certain non-cellular common carrier two way services be reclassified as private mobile services.

mobile services are commercial mobile services whether they approximate cellular service or not. Restricting the class of commercial mobile services to cellular service and its functional equivalents does eliminate troublesome questions about the meaning of "interconnected service" and "available to the public," but it does so by effectively writing the definition of commercial mobile service out of the Communications Act. Those commenters who advocate that a service be classified as private if it does not employ frequency reuse or cover a specified geographic area make a similar attempt to rewrite the statute by importing into the definition of a commercial mobile service those additional requirements, which do no appear in the Act. If Congress had wanted to limit the commercial mobile service designation to cellular and its look-alikes, or to entities employing frequency reuse over an MSA or MTA, it could easily have said so. But it did not, and for good reason. Those limitations on the definition of commercial mobile service would not contribute to a broad flexible classification of services that will be useful as the wireless marketplace expands. There is no justification for this rewriting of the plain words of the Communications Act.

B. A Licensee Offers Service "For Profit" If Any Portion Of Its Service Is Offered For Profit

Although most parties agree about the meaning of the "for profit" element of the definition of commercial mobile

service, several parties did argue that a licensee should not be considered a provider of a commercial "for profit" service if it offers that for-profit service on a secondary basis;[2] leases reserve capacity for profit; or serves fewer than 50 percent of the mobiles on its system on a for-profit basis.[3] To the extent that any licensee (including a public safety licensee or a licensee utilizing spectrum for internal purposes) makes system capacity publicly available to external subscribers for a fee, however, it must be classified as providing a commercial mobile service.[4] Any other interpretation creates the opportunity for gamesmanship with the rules and will result in uneven application of regulatory principles among entities providing the same type of service - precisely the thing that the Budget Act intended to eliminate.

C. Cellular Resellers Are Not Entitled To Tariffed Wholesale Rates

The National Cellular Resellers Association (NCRA) advocates federal rate regulation of "wholesale service offerings" by cellular carriers. The Commission should yet again reject this now tired litany by NCRA. The Commission has long since discarded any concept of separate wholesale and

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[2]Comments of National Association of Business and Educational Radio, Inc. (NABER) at pp. 7-8.

[3]Comments of Utilities Telecommunications Council at p.12.

[4]A commercial mobile service provider need not actually generate a "profit" from these services from an accounting standpoint. It is enough that a fee or charge be assessed an external subscriber for the use of the provider's facilities.

retail arms for cellular distribution, and cellular carriers routinely market their service directly to the public. Resellers continue to exist as a permissible form of distribution, but the Commission has made it clear that resale requirements do not extend to the point of requiring that carriers create and maintain a separate wholesale rate structure for the benefit of would-be resellers.[5] The Commission has expressly stated that it "has never required cellular companies to establish separate wholesale and retail operations. In the same vein, the Commission's resale policy does not require that carriers charge separate wholesale rates."[6] They must provide, and do provide, the opportunity to resell upon reasonable terms and conditions, but all that is required in terms of rates is that any volume discounts available to a cellular carrier's large "retail" customers must be available on the same terms and conditions to

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[5]Both the Commission and the Department of Justice recognize that while resellers face the pricing disadvantage of having to first purchase service from the facilities-based carriers then compete against these carriers in selling to final customers, that is the disadvantage or position faced by any distributor when its supplier engages in dual distribution. They also recognize that dual distribution does not in itself raise anticompetitive concerns. Report and Order, released June 10, 1992, in CC Docket No. 91-34, In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service (Bundling Docket), at ¶ 28; Reply Comments of the United States Department of Justice, filed June 21, 1991, in Bundling Docket, at p.12.

[6] Notice of Proposed Rulemaking and Order, released March 27, 1991, in Docket 91-33, In the Matter of Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies (Resale NPRM/Order), at ¶ 55.

resellers. Resale NPRM/Order at ¶ 44.

The NCRA erroneously argues that cellular carriers should file rate information and be rate regulated. As the Commission has previously observed, filing rate information of any kind could be anticompetitive because it would provide competitors advance notice of price changes. In addition, "engaging in traditional rate of return regulation of wholesale prices could conceivably hinder price competition, particularly if carriers' costs vary substantially. Forcing rate of return regulation on [the cellular] industry could lead to pricing distortion, including possible higher prices, and circumvent competition-driven investment." Id. at ¶ 53. Further, the Commission has explicitly stated that it has never guaranteed that any reseller would make a profit. It is only guaranteed an opportunity to resell the cellular service of a facilities-based carrier on the same terms and conditions that the carriers provide to their own customers. "Profitability for the reseller as well as for the carrier will be based on the ability to operate successfully in a competitive environment." Id. at ¶ 57. The market for wireless services has grown increasingly competitive with the advent of wide area SMRs and will grow more so with the licensing and implementation of PCS. Now more than ever it would not be wise to require separate accounting for wholesale/retail operations, or to regulate wholesale rates of cellular carriers.

D. Cellular Resellers Are Neither Commercial Mobile Service Providers Nor Entitled To Mandatory Interconnection With Such Providers

Resellers are not licensees and are not entitled to any form of interconnection with a cellular or other commercial mobile service provider's switch. The NCRA makes a vain attempt to use legislation intended to equalize regulatory burdens among licensees providing various commercial mobile services as a means of acquiring rights for resellers that neither the Commission or Congress intended to grant them. Nowhere in either the legislative history of the Budget Act or the Act itself are there any references to resellers or any indication that resellers fall within the category of "providers" of either commercial or private mobile services. To the contrary, the House Report on the Budget Act, in the discussion of Section 332 and the concept of regulatory parity, makes specific reference to the rate treatment of common carrier licensees.[7]

Resellers are by definition reselling the service that is actually being provided by a licensee. They resell service. If the service they resell is interconnected, then their customers can receive interconnected service. They themselves, however, have no independent right to interconnection, nor do they require such.

[7]H.R. Rep. 103-111.

E. IXCs' Interconnection Rights Do Not Include Access To Proprietary Customer Information

Like the NCRA, MCI tries to utilize the Budget Act and this proceeding to advance its separate agenda unrelated to the Act or its purposes, seeking increased, rather than decreased, regulation of mobile services to obtain for itself a regulatory advantage. MCI argues that interexchange carriers' access to information stored in mobile service providers' data bases (such as the Home Location Register ("HLR") and Visited Location Register ("VLR")) is necessary and appropriate.[8] It wants the Commission to rule that commercial mobile service providers' interconnection responsibilities include provision of access to their mobile location databases to IXCs, and recommends that the Commission expand the scope of such access to all common carriers. It also argues for mandatory interconnection among commercial mobile service providers.

Interconnection does not include, and IXCs are not entitled to have access to, cellular or any other commercial mobile service providers' mobile data bases. The HLR includes all sorts of proprietary customer information, including mobile number, electronic serial number ("ESN"), which features the customer has opted to purchase from the mobile service provider, the customer's PIC (if required), whether the customer will accept or pay for out of territory calls,

[8]Comments of MCI at pp. 9-10.

etc. The VLR contains similar information with respect to customers roaming into a carrier's market.

Interconnection to the hub services that the LECs currently provide is necessary to facilitate termination and reception of calls between the interconnecting service provider and the hub and between the interconnecting provider and other providers. It is the simplest and most administratively efficient mechanism for achieving the interconnection of all services, to create that much referenced "network of networks." Additional forms of mandated interconnection are unnecessary and would unnecessarily complicate access charges. The purpose of interconnection is access. Interexchange carriers have been granted rights of interconnection in order to have access and to receive and terminate calls. They are not entitled to receive proprietary customer information belonging to cellular carriers, and more importantly, do not need such information in order to route calls. Further, interexchange carriers themselves have entered the cellular and commercial mobile service market. Certainly MCI has made no secret of its intentions to enter the PCS market on a nationwide basis. The Commission would be gravely mistaken to mandate provision of this kind of proprietary customer information to one's direct competitor.

F. The Commission Should Act Now To Eliminate The Common Carrier Restriction On Dispatch

The Commission should act expeditiously to remove any existing limitations on the provision of dispatch over any common carrier frequencies, whether designated for cellular, PCS or another commercial mobile service.[9] Several parties argued that if the Commission decides to lift the restriction on provision of dispatch services over common carrier frequencies, it should not do so until after the three year grandfathering period of private mobile services.[10] There is no basis for delaying this long overdue change for three years or any other period of time.

Even before passage of the Budget Act with its impending reclassification of certain private carriers no discernible need existed for any prohibition on common carrier provision of dispatch services. With the Budget Act came the Commission's statutory authority to eliminate this outmoded restriction and promote regulatory parity in the dispatch area. Private carriers, who will not be subject to reclassification as common carriers for three years, will not

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[9]As Ameritech noted, the Commission will need to amend several sections of part 22, including 47 C.F.R. § 22.911, which prohibits dispatch on cellular frequencies. Comments of Ameritech, p.4, n.7. Of course, cellular carriers can provide "dispatch services" using their frequencies so long as the service is routed through the carrier's switch. Traditional dispatch services, however, have no such requirement.

[10]See Comments of Nextel Communications, Inc., at pp. 19-20; Comments of NABER, at p.13; Comments of AMTA, at pp.22-23; and Comments of Motorola, at pp. 12-13.

be injured by allowing carriers already subject to common carrier regulation to compete with them during the time they still enjoy the benefits of non-regulation as private carriers. To the contrary, those licensees that have been providing essentially commercial services under the aegis of private carrier regulation have been, and for three more years will continue to be, the beneficiaries of this differential regulation. Allowing common carriers, and hence more providers, into the market will stimulate competition, lower costs to consumers and provide more choices for consumers, since the common carriers will be competing against each other as well as against the private carriers.

G. The Commission Should Not Impose Additional Structural Or Regulatory Requirements On LEC-Affiliates

There is no need for any additional structural safeguards on LEC-affiliates or for differential regulation of LEC affiliated commercial mobile service providers. Arguing that "dominant" carriers[11] and their affiliates should be subject to full Title II regulation does not make sense within the wireless market. Simply because a carrier is affiliated with a LEC does not give it instant dominance in the competitive market for wireless mobile services. Many of the arguments by parties advocating structural safeguards for "dominant" carriers with commercial mobile service affiliates, presumably

[11] See, e.g., Comments of Nextel Communications, Inc., at p.23; Comments of Pactel Corporation, at p.17; Comments of General Communication, Inc., at p.3.

referring to the LECs and AT&T, overlook the fact that with respect to LEC affiliates, commercial mobile service is frequently provided in a geographic market completely outside of the LECs service area. A majority of SBMS' cellular pops and customers are located in markets outside the areas served by its land line affiliate.

Those commenters who state, for example, that cellular affiliates of LECs do not have to recover the costs of interconnection from their customers display a lack of knowledge about the industry.[12] Cellular affiliates do have to recoup these costs from their customers, and they do so even with respect to interconnection paid to their affiliate LEC. Further, SBC's cellular affiliate, SBMS, operates in such out of region markets as Chicago, Central Illinois, Washington-Baltimore, and Boston. Interconnection fees paid to the LECs there certainly do not constitute "pocket-to-pocket" intercompany transfers.[13] Even in the state(s) in which a particular LEC operates, its cellular affiliate often has interconnections at multiple access tandems of several different LECs. This is certainly the case for SBMS, and there is no question but that these interconnection charges

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[12]See Comments of Comcast Corporation at 7.

[13]There is a similar flaw in the argument that BOC affiliates should be subject to equal access requirements because of an alleged link to a "bottleneck facility." BOC cellular affiliates have been subjected to equal access requirements in all of their markets, including those markets outside their LEC affiliates' service areas.

constitute an out of pocket cost for SBMS.

The additional requirements for LEC-affiliated commercial mobile service interconnection proposed by Comcast Corporation are unnecessary and should not be adopted. LEC-affiliated commercial mobile service providers should not be required to charge separately their end-users an amount not less than the full cost of the basic service components for such services. Neither should they be prohibited from doing so, however. They have an incentive as described above, to recoup these costs, but there is absolutely no need from a regulatory standpoint to mandate it for some but not all commercial mobile service providers. Non-affiliated carriers should not be given the regulatory advantage of having LEC affiliates separately state a cost based component. Non-affiliates could then purport to undercut that component and advertise a lower price, which might bear no relationship to its actual cost (since its costs won't be monitored), or it could choose not to state separately an interconnection charge to its customers and obtain a marketing advantage in that regard. Such competitive issues should be resolved in the marketplace, not in this Docket proceeding.

Likewise, the Commission should not condition the mobile service licenses of LEC affiliates on actions taken or not taken by the LEC.[14] Automatic revocation of a license is the

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[14]See, e.g., Comments of Comcast Corporation, at p.7.

ultimate penalty and not one that can or should be imposed as a result of action taken by a separate albeit affiliated entity. Adequate safeguards are already in place to monitor and discipline cellular and other commercial mobile service providers, including forfeitures and the specter of license non-renewal. Similarly, there are already safeguards and procedures in place to monitor and discipline LECs in connection with the Commission's interconnection policies. License revocation based on matters beyond an affiliate's control is inappropriate and certainly not necessary.

H. The Commission Should Reject The D.C. Public Service Commission's Proposal For Re-regulation By The States

It is far too early at this stage to try to set forth hard and fast guidelines for the re-regulation of commercial mobile services by state authorities. The Public Service Commission of the District of Columbia (D.C. PCS) has nonetheless devised a scheme for re-regulation of commercial mobile services by a state if any one of three tests are met. They are as follows: 1) 15% of basic service subscribers in an exchange area do not have access to basic service from any phone company other than a commercial mobile service licensee; 2) the rates for basic services offered by this provider are higher than rates of the pre-existing land line carrier; or 3) the commercial mobile service provider has market power in a relevant market. None of these tests are appropriate, and none fulfills the statutory criteria for re-regulation by a

state.

Section 332(c)(3) requires that a state petition for re-regulation demonstrate that market conditions with respect to commercial mobile services in the state fail to protect subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or that such conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State. Therefore, part one of the D.C. PCS test fails for two reasons. It speaks in terms of a lack of "telephone company" service to 15% of subscribers in any one exchange area in the State, whereas the statute speaks in terms of a particular service being a replacement for land line service for a substantial portion of the land line exchange service within the State. Conditions in one exchange area do not necessarily indicate conditions statewide, and the statute addresses only the latter situation. Further, the Conference Committee made it clear that re-regulation was not intended where, despite the absence of traditional land line service, a customer had available the choice of obtaining basic telephone service from among alternative providers of that service employing radio transmission as a means of service.[15]

The second test involves comparing the rates of the mobile service with those of the "pre-existing land line

[15]H.R. Conf. Rep. 103-213.

carrier." Comparing commercial mobile service rates and land line rates, however, is a meaningless comparison of apples and oranges. Congress is concerned about whether rates become unjust and unreasonable, not about attempting to compare commercial mobile service rates to the highly regulated rates of land line companies.

The third test is similarly unhelpful as it does little to advance the question of whether rates themselves are actually unjust or discriminatory. The PSC does not explain, for example, how it would measure market power or whether (and how) the state would have to demonstrate that such power had an actual adverse effect on rates.

Finally, the PSC's recommendation that no petition to remove regulation after a state petition is granted should be permitted for a period of three years is far too inflexible and is at odds with the more flexible statutory requirement that petitions may be filed after a reasonable amount of time has elapsed, as determined by the Commission. 47 U.S.C. section 332(c)(3). In sum, while it is clear that the D.C. PSC is interested in facilitating re-regulation of commercial mobile service by the state, it has not provided viable guidelines consistent with the strictures of the Communications Act for determining when, in fact, such re-regulation might be warranted.

III. CONCLUSION

SBC and its affiliate SBMS are active participants in the

wireless market and strongly support the goals of regulatory parity and streamlining of regulation for competitive wireless services. They urge the Commission to take full advantage of the opportunities afforded it by Congress in the Budget Act to advance both of these goals to the ultimate benefit of consumers of wireless services.

Respectfully submitted,

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November 23, 1993

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